SUPREME COURT, U. S.
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No. 72-397

In the Supreme Court of the United States

OCTOBER TERM, 1973

BONELLI CATTLE CO., ET AL., PETITIONERS

v.

THE STATE OF ARIZONA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is submitted in continuing response to the invitation of this Court on November 20, 1972, requesting the Solicitor General to express the views of the United States in this case. In January 1973 we submitted a memorandum urging that certiorari be denied because the Arizona Supreme Court's decision reached the right result, though it erred in several respects in the process of reaching its decision. This Court having granted certiorari, this memorandum is submitted supporting affirmance of the Arizona decision, on the assumption that we construe it correctly.

INTEREST OF THE UNITED STATES

The United States, through the Bureau of Land Management, the Bureau of Sport Fisheries and Wildlife, and the Bureau of Indian Affairs, is the owner

of more than 200 miles of Colorado River shoreline in the State of Arizona, much of which is directly affected by the rule of law laid down in this case. The quiet enjoyment of some of this land has been threatened by some interpretations of this decision.[1] In addition, the United States has an interest in the maintenance of the principle of the supremacy of federal law in the resolution of disputes concerning the boundaries of lands deriving from federal patents.

DISCUSSION

1. The opinion of the Arizona Supreme Court can be read as quieting the state's title to any portion of the former riverbed which was below the high water mark at any time between the admission of Arizona to the Union and the channelization of the Colorado River in 1959. Such a holding may be implied by the court's statement that "Arizona's title as against private persons is in no way controlled by the opinion in *United States* v. *Claridge*, 279 F. Supp. 87, aff'd 416 F. 2d 933" (Pet. App. 6b). We submit such a ruling would be wholly erroneous, as applied to any owner—like the Bonellis—whose title derived from a federal patent issued before statehood.

The true rule is that the extent of the estate of a patentee from the United States is governed by federal law, and that, as a matter of federal law, any lands exposed by reliction accrue to the riparian patentee on

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[1] We are informed by the Interior Department that Arizona agencies have attempted to grant leases to federal land which would belong to the state under an expansive interpretation of this decision. A proper interpretation of the decision would avoid possible State-Federal conflict over extensive federal riparian land holdings.

a navigable body of water. *Hughes* v. *Washington*, 389 U.S. 290. The decision in *Claridge* is an application of that principle and would be controlling here if any reliction had occurred adjacent to the Bonelli tract. As we understand the Arizona Court's opinion, however, it assumes no such occurrence (see Pet. App. 4a), and there may be, accordingly, no occasion to apply the federal rule.

2. Our conclusion depends on construing the Arizona court's opinion as applying the correct federal standards in locating the high water mark in the river. The federal rule, as expressed in *Alabama* v. *Georgia*, 23 How. 505, 515, is that the bed, which is owned by the State, is that area which "is adequate to contain [the supply of water] at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring * * *." See also *Oklahoma* v. *Texas*, 260 U.S. 606, 631-632. This comports with the definition in *Howard* v. *Ingersoll*, 13 How. 381, 427, cited by the Arizona court (Pet. App. 7b) in that the banks, which are held not to be state property, are those elevations which contain the water when it rises out of the bed during the "extraordinary freshets." Thus, the rule laid down in the Arizona court's supplemental opinion seems to be consonant with existing federal law.[2]

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[2] We note that the court's supplemental opinion states that the boundary is "the ordinary high water mark *in* the natural channel" (Pet. App. 4b) (emphasis added), and that "[i]t is in the sense of the usual and ordinary that the words * * * 'high water mark' were used in our decision * * *" (Pet. App. 6b). These indications would seem to exclude the areas covered only by brief and unusual annual floods from the area within the high water mark. *State* v. *Sorenson*, 222 Iowa 1248, 271 N.W. 234, specifically approved by the Arizona court, states that the high water mark "is not the line reached by unusual floods, but the line to which high water ordinarily reaches" (Pet. App. 8b).

If, as the Arizona court leads us to believe, no part of the Bonelli tract which was once below the high water mark ever emerged until channelization in 1959, and that the only change effected by the erection of Hoover Dam was the elimination of the spring floods—which must be ignored in fixing the riparian boundary[3]—it follows that the *Claridge* rule of reliction does not apply and the result reached is correct.

3. We recognize, of course, that a substantial change occurred when the Colorado River was channelized in 1959. This action, however, cannot be characterized as reliction. The river receded suddenly and dramatically, as a consequence of work undertaken for the very purpose of narrowing and deepening the channel. Such an avulsion in a navigable river does not affect the title to adjacent

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[3] The composite map which appears at Petition, page 33, Petitioner's Appendix, page 2d, and Petitioner's Brief, page 54, accurately reflects the boundary that would be established in this case under federal law. That boundary is the ordinary high water mark of the Colorado River, exclusive of the annual floods which occurred prior to the closing of Hoover Dam, which leaves the Bonellis as owners of some 60 acres in the southeast corner of Section 3, lying to the east of the line marked as the "*Claridge* line" on the composite map. We note, however, that both the Bonellis (Br. 10-11) and the State of Arizona (Br. 28-30) apparently contend that the Arizona Supreme Court's decision fixed the pre-1959 ordinary high water mark at the level reached by the spring floods before the erection of Hoover Dam. This is the line marked as the "*Bonelli*" high water mark on the composite map. We emphasize that this line is not a judicially determined line. It is a construction made by the parties in this case: by Arizona because they hope it is the correct line and by the Bonellis because they fear it is. We disagree. We believe that the Arizona decision correctly places the pre-1959 ordinary high water mark (and thus the boundary between Bonelli and State property) at the boundary of the actual active channel of the River before the channelization.

lands, and the exposed riverbed remains state property, up to the riparian boundary prior to the avulsion. *Oklahoma* v. *Texas*, 258 U.S. 574, 583; *Philadelphia Company* v. *Stimson*, 223 U.S. 605, 631-632; *Nebraska* v. *Iowa*, 143 U.S. 359, 361. Longstanding federal administrative practice has also recognized that the changes caused by channelization are avulsive changes. The *Claridge* case did not involve a channelization, and thus in no way conflicts with the Arizona decision, which was correct as a matter of federal law on this point.[4]

CONCLUSION

On the assumption that we properly construe the opinion of the Arizona Supreme Court, we believe the judgment is correct and accordingly, urge affirmance. Nevertheless, in order to avoid a precedent adverse to the interest of federal patentees, we submit this Court should expressly announce the controlling federal law applicable in the circumstances.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[4] This case does not raise any issue of access to the water. If the state were to deny any of the former riparian owners reasonable access to the river to exercise any water or riparian rights owned before the rechannelization, such denial might very well be illegal, or amount to a taking of property. This is particularly true with respect to riparian Indian lands granted for the purpose of allowing the Indians to fish or otherwise use the water. But that issue is not raised by the Bonelli Cattle Company's complaint. Neither does the issue appear to have been considered or discussed by the Arizona courts.